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No. 87-7023

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Where a Michigan prisoner's 42 USC Section 1983 cause of action arose during confinement, did the lower courts err by refusing to apply Michigan's statute of limitations' tolling provision which extends a prisoner's time for bringing an action until one year after his release?

PARTIES

The petitioner in this Court is Tyrone Victor Hardin, who was the plaintiff in the proceedings below. The respondent is Dennis Straub, who the petitioner alleges was in charge of the Reception and Guidance Center at the State Prison of Southern Michigan, in Jackson, Michigan, when the petitioner's cause of action arose.

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	6
I. INTRODUCTION.....	6
II. HISTORY AND PURPOSE OF TOLLING STATUTES.....	6
A. There Is Significant Historical Support For Tolling And Disability Provisions.....	6
B. Michigan's Disability Tolling Statute.....	7
C. Recent Federal Court Findings That Michigan Does Not Provide Prison Inmates With Meaningful Access To The Courts Makes The Imprisonment Tolling Law Even More Important.....	9
III. U.S. SUPREME COURT DECISIONS.....	11
A. This Court Has Consistently Found Tolling Provisions To Be Inseparable Components Of Statute Of Limitations Systems.....	11
B. Application Of State Statute Of Limitations Tolling Provisions Is Not "Inconsistent With The Constitution And Laws Of The United States.".....	16
IV. THE LOWER COURT DECISION REFUSING TO APPLY MICHIGAN'S IMPRISONMENT TOLLING STATUTE WAS CLEARLY ERRONEOUS.....	21
A. The Sixth Circuit Decision In <i>Higley</i> Is Erroneous.....	21
B. Tolling Statutes In Other Circuits.....	26
RELIEF.....	32

TABLE OF AUTHORITIES

Cases	Pages
<i>Austin v. Brammer</i> , 555 F.2d 142 (CA 6, 1977)	30
<i>Bailey v. Faulkner</i> , 765 F.2d 102 (CA 7, 1985)	27
<i>Board of Regents v. Tomanio</i> , 446 US 478 (1980).	<i>passim</i>
<i>Bounds v. Smith</i> , 430 US 817 (1977).	10
<i>Brown v. Bigger</i> , 622 F.2d 1025 (CA 10, 1980)	29
<i>Burnett v. Grattan</i> , 468 US 42 (1984).	<i>passim</i>
<i>Campbell v. Guy</i> , 520 F.Supp. 53 (ED Mich 1981)	24
<i>Chardon v. Fumero Soto</i> , 462 US 650 (1983).	<i>passim</i>
<i>Covington v. Winger</i> , 562 F.Supp 115 (WD Mich 1983)	31
<i>Domann v. Pence</i> , 183 Kan 196, 326 P 2d 260 (1958).	29
<i>Duncan v. Nelson</i> , 466 F.2d 939 (CA 7, 1972)	29
<i>Felder v. Casey</i> , 486 US —, 108 S Ct. 2302 (1988) 6, 19, 21	
<i>Griffin v. Breckenridge</i> , 403 US 88 (1971)	16
<i>Hadix v. Johnson</i> 694 F.Supp 259 (ED Mich 1988). 10, 11, 18	
<i>Hawkins v. Justin</i> , 109 Mich App 743 (1981).	<i>passim</i>
<i>Heard v. Caldwell</i> , 364 F.Supp. 419 (SD Ga 1973)	7
<i>Higley v. Michigan Department of Corrections</i> , 835 F.2d 623 (CA 6, 1987).	<i>passim</i>
<i>Hughes v. Sheriff of Fall River County Jail</i> , 814 F.2d 532 (CA 8, 1987).	28
<i>Johnson v. Avery</i> , 393 US 483 (1969)	17
<i>Johnson v. Railway Express Agency</i> , 421 US 454 (1974).	7, 13, 14, 15, 18
<i>Kaiser v. Cahn</i> , 510 F.2d 282 (CA 2, 1974)	28
<i>Knop v. Johnson</i> 667 F.Supp. 467 (WD Mich 1987).	10, 18
<i>Kurzawa v. Mueller</i> , 545 F.Supp. 1254 (ED Mich 1982)	31
<i>Massachusetts v. Murgia</i> , 427 US 307 (1976)	25
<i>May v. Economoto</i> , 633 F.2d 164 (CA 9, 1980)	26
<i>Major v. Arizona</i> , 642 F.2d 311 (CA 9, 1981).	26, 27
<i>McClaine v. Rankin</i> , 197 US 154 (1904)	12
<i>McNeese v. Board of Education</i> , 373 US 668 (1963)	17
<i>Miller v. Smith</i> , 615 F.2d 1037 (CA 5, 1980).	25, 28, 29
<i>Miller v. Smith</i> , 625 F.2d 144 (CA 5, 1980)	29
<i>Mitchum v. Foster</i> , 407 US 225 (1972)	16
<i>Monroe v. Pape</i> , 365 US 167 (1961).	17

Table of Authorities Continued

	Page
<i>Moor v. County of Alameda</i> , 411 U.S. 693 (1973)	12
<i>Mulligan v. Schlacter</i> , 389 F.2d 231 (CA 6, 1968).	30
<i>Ney v. State of California</i> , 439 F.2d 1285 (CA 9, 1971)..	26
<i>O'Sullivan v. Felix</i> , 233 U.S. 318 (1914)	11
<i>Ortiz v. LaVallee</i> , 442 F.2d 912 (CA 2, 1971).	27, 28
<i>Perotti v. Carty</i> , 647 F.Supp. 39 (SD Ohio 1986)	24
<i>Robertson v. Wegmann</i> , 436 US 584 (1978)	15
<i>Smith v. MacDougall</i> , 626 P2d 656 (Ariz App 1983)	26
<i>State v. Calhoun</i> , 50 Kan 523, 32 P 38 (1893)	29
<i>Stephan v. Dowdle</i> , 733 F.2d 642 (CA 9, 1984)	26
<i>Turner v. Evans</i> , 721 F.2d 341 (CA 11, 1983).	29, 30
<i>Vance v. Bradley</i> , 440 US 93 (1979).	25
<i>Vargas v. Jago</i> , 636 F.Supp. 425 (SD Ohio 1986).	22, 23
<i>Whitson v. Boker</i> , 755 F.2d 1406 (CA 11, 1985).	29, 30
<i>Williams v. Hollins</i> , 428 F.2d 1221 (CA 6, 1970)	30
<i>Wilson v. Garcia</i> , 471 US 261 (1985).	<i>passim</i>
<i>Wolff v. McDonnell</i> , 418 US 539 (1974)	18

STATUTES

42 USC Section 1983.	<i>passim</i>
42 USC Section 1988.	1, 12, 16, 18
Michigan Compiled Laws 600.5805(1).	2
Michigan Compiled Laws 600.5805(8).	2, 16, 24
Michigan Compiled Laws 600.5851(1).	<i>passim</i>
Michigan Compiled Laws 600.5853	7
Michigan Compiled Laws 600.5855	7
Michigan Compiled Laws 600.5854	7
Michigan Revised Statutes of 1846, Chapter 139	7

Miscellaneous

51 AmJur 2d Section 178 et seq.	7
54 C.J.S. Sections 115, 116	7

OPINIONS BELOW

The opinion of the U.S. District Court for the Eastern District of Michigan was unreported and is reprinted in the Joint Appendix at 26. The opinion of the U.S. Court of Appeals for the Sixth Circuit was also unreported and is reprinted in the Joint Appendix at 34.

JURISDICTION

The Court of Appeals issued its decision on December 18, 1987. A timely petition for rehearing *en banc* was denied on February 18, 1988, and the mandate issued on March 17, 1988. A petition for certiorari was filed within ninety days. Jurisdiction in this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 USC Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC Sec. 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS', and of Title 'CRIMES', for the protection of all persons in the United States in their civil rights, and for their vin-

dication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause

. . .

MCL 600.5805.(1):

A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

MCL 600.5805(8):

The period of limitations is 3 years after the time of death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

MCL 600.5851(1)

Except as otherwise provided in subsection (7), if the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.

STATEMENT OF THE CASE

Petitioner Tyrone Victor Hardin was transferred from the Kent County Jail to the State Prison of Southern Michigan in Jackson on October 24, 1980. J.A. at 6. Upon his arrival at the state facility, he was taken to the Reception and Guidance Center and placed in administrative segregation. He remained at the Center on "000" segregation status until January, 1981, when he was placed in a detention cell in 5-Block, which at that time was the prison's segregation unit.

Petitioner remained confined to his cell in 5-Block until early March, 1981, when he was returned to the Kent County Jail for trial. On May 14, 1981, petitioner came back to the state prison, where he was again placed in segregation at the Center and subsequently re-assigned to detention in 5-Block. Petitioner remained in detention in 5-Block until July 15, 1981, when he was transferred from Jackson to Marquette Branch Prison. J.A. at 8. In all, petitioner served close to 180 days in segregation, much of the time confined to his cell twenty-four hours a day.

Petitioner alleges that pursuant to Michigan Department of Corrections regulations, Rule 791.4405, administrative segregation may only be imposed on residents for certain violations, and pursuant to Rule 791.3315, a resident shall be afforded an opportunity for a hearing before being classified to administrative segregation. Petitioner claims that at no time from October 24, 1980, to July 15, 1981, was he given the required hearing. J.A. at 7.

In October, 1980, petitioner was twenty-five years old and had been incarcerated for all but three months of the previous seven years. J.A. at 17. Petitioner also had an

extensive juvenile record dating back to 1967, when he was twelve years old. J.A. at 17. Petitioner's formal education is not known from the record; he apparently completed a General Education Diploma (G.E.D.) during an earlier incarceration at Jackson. J.A. at 20. Petitioner states that not until July 22, 1984, was he provided with a rule book of the Michigan Department of Corrections which contained the procedures to be followed when a resident is placed in administrative segregation. And not until September, 1985, when petitioner saw a copy of his classification report, did he learn that he had been placed in administrative segregation for reasons that might conflict with the rules. (See Petition for Certiorari, at 4.)

Petitioner filed this action in the Eastern District of Michigan on December 24, 1985. The complaint alleged that petitioner's confinement in segregation without a hearing in 1980 and 1981 violated his rights under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, contrary to 42 U.S.C. Sec. 1983. The complaint also alleged that petitioner had no legal knowledge and that he had to pay prison writ-writers in order to bring his complaint. J.A. at 8.

Pursuant to 28 U.S.C. Sec. 1915, the district court *sua sponte* reviewed the merits of the complaint with the *in forma pauperis* petition, prior to service on the defendant. On February 26, 1986, the district court dismissed the complaint as frivolous, holding that petitioner's action was barred by Michigan three-year statute of limitations. J.A. at 26. Petitioner's motion to vacate the dismissal was denied as untimely. J.A. at 33.

On appeal to the Court of Appeals the case was assigned to a panel pursuant to Rule 9, Rules of the Sixth Circuit, which permits summary disposition of frivolous

cases. The court declined the Michigan Attorney General's offer to participate in the appeal (see Brief for Respondent in Opposition to Certiorari, at 1), and affirmed the district court without oral argument.

The Sixth Circuit panel said that petitioner's action was time-barred under the rule of *Higley v. Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987), which held that Michigan's statute of limitations' tolling provisions do not apply to prisoners' claims under 42 U.S.C. Sec. 1983. Petitioner's request for rehearing *en banc* was denied, and the Court of Appeals' mandate issued on March 17, 1988. Mr. Hardin timely filed a *pro se* Petition for Certiorari and this Petition was granted on October 11, 1988.

SUMMARY OF ARGUMENT

The question in this case is whether a federal court hearing a state prisoner's section 1983 case must apply that state's imprisonment tolling statute. Since the Civil Rights Acts contain no statutes of limitations, this Court has held that trial courts shall apply statute of limitation law and interrelated tolling provisions of the state where the action arises, unless the state law is found to be inconsistent with federal law. *Board of Regents v. Tomanio*, 446 US 478 (1980). The court below has properly identified MCL 600.5805(1) (3 year statute) and MCL 600.5851 (tolling) as the applicable Michigan statutes. The court below has properly recognized that Michigan courts would apply MCL 600.5851(1) to toll this action. *Higley v. Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987), citing *Hawkins v. Justin*, 109 Mich App 743 (1981). The court below erred by finding Michigan's imprisonment tolling law to be inconsistent with the policies embodied in section 1983.

The central objective of the Reconstruction-Era Civil Rights laws is to provide compensatory relief to those deprived of their federal rights by state actors. *Felder v. Casey*, 486 US ___, 108 S Ct 2302 (1988).

The Second, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have approved of the application of state statutes of limitations' prisoner tolling provisions to section 1983 claims. The Sixth Circuit decision relied upon by the court below (*Higley v. Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987)) appears to be alone among appellate courts in finding a state law which tolls the statute of limitations for prisoners inconsistent with the purposes of section 1983.

The remedial goals of section 1983 are safeguarded and advanced by an imprisonment tolling law. Michigan's tolling statute is consistent with the Constitution and laws of the United States and it should be applied.

ARGUMENT

I. INTRODUCTION

The issue to be decided by this Court is whether the Michigan statute of limitations' imprisonment tolling provision must be applied to an inmate's civil rights claim filed under 42 USC Section 1983. Petitioner contends that state tolling law must be applied in light of this Court's holdings in *Wilson v. Garcia*, 471 US 261 (1985), and *Board of Regents v. Tomanio*, 446 US 478 (1980).

II. HISTORY AND PURPOSE OF TOLLING STATUTES

A. There Is Significant Historical Support For Tolling And Disability Provisions

Provisions tolling actions accruing during disabilities such as infancy, insanity and incarceration, have been

codified in nearly every state.¹ Similar provisions toll limitation periods for absence from a state, fraudulent concealment of a cause of action or absence during war time.² These tolling provisions are generally derived from the common law. The rule in respect to maintenance of actions by prisoners derives from the common law doctrine that a convicted felon was *civiliter mortuus* (civilly dead). See *Heard v. Caldwell*, 364 F.Supp. 419 (SD Ga 1973).

B. Michigan's Disability Tolling Statute.

Michigan has a statute which tolls the time for filing a suit under certain circumstances. In pertinent part, the statute provides:

If the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person has 1 YEAR after the disability is removed through death or otherwise to make the entry or bring the action, although the period of limitation has run. (MCLA 600.5851; MSA 27A 5851(1).)

Michigan first codified the predecessor to today's disability statute for prisoners in 1846.³ Those whose action accrued while in prison were given five years after their release to start the suit.

¹ See 54 C.J.S. Sections 115, 116, 51 AmJur 2d Section 178 et seq. Federal tolling provisions have been adopted for use in cases where the statute of limitations is established by federal law, e.g. 28 USC Section 2401 (suits against the U.S.); 28 USC Section 2416 (suits by the U.S.). See also *Johnson v. Railway Express Agency*, 421 US 454, 466 (1974).

² See e.g. MCLA 600.5853, 5855, 5854.

³ Section 5 of R.S. 1846, Chapter 139.

The Michigan legislature recognized in 1972 that circumstances for prisoners had changed and that a five year period was no longer required. As a consequence, the time for bringing an action after removal of the disability was shortened from five years to one year. Since 1972, the disability tolling statute has been reviewed by the Michigan legislature, most recently in 1986. *Higley v. Michigan Department of Corrections*, 835 F.2d 623, 625 (CA 6, 1987).

In addition to its recent affirmation by the Michigan legislature, the tolling statute has been reviewed and upheld by Michigan courts. See *Higley*, 835 F.2d 625.

In *Hawkins v. Justin*, 109 Mich App 743, 311 NW 2d (1981), the Michigan imprisonment tolling statute was challenged as a denial of equal protection. The appellate court rejected the lower court's finding that the tolling provision was unconstitutional. In its analysis, the appellate panel examined the governmental interest underlying the statute by looking at the legislative history. The court cited with approval the 1972 Michigan legislative committee comment concerning the disability provision:

"Section 5851 is based on Sections 609.5, 609.6 and 609.15 of CL 1948. However, the present law is changed substantially. The period in which an action can be brought after a disability has been removed has been reduced from the present five years for real actions, and the present period of original limitation in personal actions, to one year for all actions. At the present time infants and insane persons are able to bring actions through their guardians and even prisoners can bring civil actions, though they may not be allowed to be personally present, so it is not as necessary to provide long periods after the removal of the disability in which to sue as it was in the past when these disabilities were considerably more real. Nev-

ertheless, it was considered better to allow a short period after the termination of the disability in which the person under the disability could bring an action."

109 Mich App at 748.

The court concluded that "[t]here is no question that the Legislature had the power to enact this statute and determine the conditions under which a right may accrue . . . 109 Mi App at 747. The court rejected the argument that the statute was outdated and could be ignored.

Defendant correctly argues that prisoners today are generally less isolated and less restricted than they were historically *** The Legislature still could have determined rationally that prisoners are more restricted than ordinary citizens and thus in need of the special protection afforded by the statute. The Legislature reasonably could have found that, notwithstanding the ability of prisoners to obtain legal counsel and have access to the judicial process, they still have restraints imposed by their confinement which places them at a disadvantage compared to ordinary citizens.

109 Mich App 747-48

In sum, Michigan courts have correctly recognized that the establishment of limitations statutes is properly a legislative decision.

C. Recent Federal Court Findings That Michigan Does Not Provide Prison Inmates With Meaningful Access To The Courts Makes The Imprisonment Tolling Law Even More Important.

The legislative findings upon which MCL 600.5851 is based are buttressed by the recent factual findings of two separate federal courts concerning inmate access to the legal system.

In *Hadix v. Johnson*, 694 F.Supp 259 (ED Mich 1988), a class action, the court was called upon to determine whether a Michigan prison housing nearly 10,000 inmates was providing meaningful access to the courts as required by the U.S. Constitution, and *Bounds v. Smith* 430 US 817 (1977). The court concluded that it was not. Judge Feikens' findings, which were based upon in depth proofs taken over a three year period, included a determination that the law library system was inadequate and that inmates who are functionally or actually illiterate, indigent or in segregated confinement are unable to use the library system to gain meaningful access to the courts. The decision also held that legal assistance available is not sufficient and does not constitute meaningful access to the courts. 694 F.Supp at 286.

Evidence admitted in the *Hadix* case showed that between twenty and fifty percent of the inmate population was unable to use any law library materials because of actual or functional illiteracy. The average reading level was determined to be grade six to grade six and one half. 694 F.Supp at 269-70.

Knop v. Johnson, 667 F.Supp. 467 (W.D. MI 1987) was a federal class action concerning conditions at four Michigan Department of Corrections institutions. In *Knop*, the district court held that inadequate law library policies violate the inmates' right of access to courts such that the system violates constitutional guarantees. According to the *Knop* court, "the main law libraries do not contain certain materials that an inmate needs to file a meaningful complaint." 667 F.Supp at 495.

In light of these recent federal court findings that Michigan inmates are denied meaningful access to the courts, state law tolling provisions for prisoners take on greater

significance. It is not inconsistent with federal law to safeguard a prisoner's cause of action until he is out of the institution and better able to gain access to the courts.

The facts found generally applicable to Michigan prisoners by the Michigan legislature and two federal courts in Michigan are specifically true as to petitioner Hardin based on the record in this case.

Mr. Hardin's cause of action accrued while he was in the Reception Center at the State Prison of Southern Michigan, the institution found constitutionally deficient in *Hadix, supra*. During his stay at the State Prison of Southern Michigan, he was held in detention. J.A. at 7. Petitioner Hardin indicated in his Motion for Appointment of Counsel filed with this Court that he can only gain access to the prison library on a limited basis, and that the law materials contained in that library are very limited. In his complaint, Petitioner stated that he had no legal knowledge, and that he had to pay prison writ-writers in order to bring his case. Mr. Hardin did not complete high school, but was able to earn a General Education Diploma during his imprisonment. J.A. at 20. Petitioner's factual circumstances make application of the tolling provision both appropriate and necessary.

III. U.S. SUPREME COURT DECISIONS

A. This Court Has Consistently Found Tolling Provisions To Be Inseparable Components Of Statute Of Limitations Systems.

Section 1983 of the Civil Rights Act of 1871 created a federal remedy for citizens deprived of their constitutional rights under color of state law. A statute of limitations was not specified by the legislation. In *O'Sullivan v. Felix*, 233 U.S. 318 (1914), the United States Supreme Court approved the federal courts' practice of selecting

state statutes of limitations for claims brought under the Civil Rights Act, citing *McClaine v. Rankin*, 197 US 154 (1904). In *McClaine* this Court declared that "in the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular state is applicable." 197 US at 158.

This federal practice of "borrowing" was formalized and incorporated into the text of 42 USC Section 1988. In *Moor v. County of Alameda*, 411 U.S. 693 (1973), this Court held that 42 USC Section 1988 governed the source of procedural law for actions brought under the Civil Rights Act.⁴

In *Wilson v. Garcia*, 471 US (1985), this Court interpreted 42 USC Section 1988 to require a three step inquiry in selecting the appropriate statute of limitations:

"First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' . . . If no suitable federal rule exists, courts undertake the second step by considering application of

⁴ 42 USC Section 1988 states:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

state 'common law, as modified and changed by the constitution and statutes' of the forum state. *Ibid.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.'

421 US at 267, quoting *Burnett v. Grattan*, 468 US 42, 47-48 (1984). *Wilson* "principally involve[d] the second step in the process: the selection of 'the most appropriate' or 'the most analogous' state statute . . ." 471 US at 268 (footnotes omitted). *Wilson* held that a single statute must be selected for each state, 471 US at 275, and further held that the most appropriate statute was that applicable to "the tort action for the recovery of damages for personal injuries", 471 US 276.

Wilson, while making a federal court consider and apply of the 'most analogous state statute', recognizes that:

the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law.

471 US at 269. This recognition confirms a series of recent decisions of this Court.

In *Johnson v. Railway Express Agency*, 421 US 454 (1974), this Court held that "since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under Section 1981, the controlling period would ordinarily be the most appropriate one provided by state law" (citations omitted). 421 US at 462. The *Johnson* Court went on to conclude that tolling provisions must also be applied:

In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and

questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

421 US at 464.

In *Board of Regents v. Tomanio*, 446 US 478 (1980), this Court reiterated its commitment to apply state statutes of limitations and tolling laws to actions brought under the Civil Rights Act, unless the state law was found to be inconsistent with the federal constitution or federal law. As a result, this Court applied New York statute of limitations and interdependent tolling rules, stating: "We believe that the application of the New York law of tolling is in fact more consistent with the policies of federalism invoked by the Court of Appeals than a rule which displaces the state rule in favor of an ad hoc federal rule" (446 US at 491-92). The *Tomanio* Court noted that in most cases involving a limitation period for a federal statute, the federal courts are faced with a choice between state law and the creation of federal law that is inherently arbitrary.

In Section 1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law.

446 US at 484.

In *Tomanio* this Court was unwilling to judicially revise the rule selected by the New York legislature, 446 US at 491-92.

In *Chardon v. Fumero Soto*, 462 US 650 (1983), this Court continued its policy of uniformly accepting and applying state tolling provisions. *Chardon* involved a Sec-

tion 1983 class action against Puerto Rican education officials. The class certification effort failed because the class was not sufficiently numerous. Individual actions were then consolidated. Respondents moved to dismiss petitioners' complaints as time barred; the lower courts rejected the defendants statute of limitations arguments. This court held that the tolling provisions of Puerto Rican law applied.

"Because the chronological length of the limitation period is interrelated with provisions regarding tolling, we reasoned that the practice of borrowing state statutes of limitations logically includes rules of tolling."

462 US at 657.

See also *Robertson v. Wegmann*, 436 US 584 (1978), which upheld and applied a Louisiana statute which had the effect of abating a 1983 action upon the death of the petitioner.

These cases establish that it is neither possible nor practical to view statutes of limitations in a vacuum. The body of statutory laws of tolling, revival and disability are all interrelated. As this Court pointed out in *Johnson v. Railway Express Agency, supra*:

Any period of limitation is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interest in favor of protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale ones.

421 US at 463-64.

In summary, this Court has consistently recognized that state statutes of limitations apply in 1983 actions and that state tolling provisions are, of necessity, an integral part of those statutes.

B. Application Of State Statute Of Limitations' Tolling Provisions Is Not "Inconsistent With The Constitution And Laws Of The United States."

The issue in this case is narrow. There is no dispute that MCL 600.5805(8) provides a three year statute of limitations which is generally applicable to actions brought under 42 USC Section 1983. There is no dispute that Mr. Hardin's suit was filed beyond this limitation period.⁵ There is no dispute that Michigan courts would apply MCL 600.5851 to toll the statute of limitations as to Mr. Hardin. *Hawkins v. Justin*, *supra*; *Higley*, 623 F.2d at 625. It is further beyond dispute that a federal court must apply the state tolling law in favor of Mr. Hardin unless it finds the tolling statute "not consistent with the constitution and laws of the United States," 42 USC 1988; *Tomanio*, *supra*; *Chardon v. Fumero Soto*, *supra*.

The issue then is whether the Michigan disability tolling statute is inconsistent with 42 USC 1983.

The central objective of the Reconstruction-Era civil rights statutes is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. *Burnett v. Grattan*, 468 US at 55. *See also*: *Mitchum v. Foster*, 407 US 225, 239, (1972); *Griffin v. Breckenridge*, 403 US 88,

⁵ Mr. Hardin's cause of action accrued no earlier than October 24, 1980, his first day of administrative segregation at State Prison of Southern Michigan and no later than July 15, 1981, the last day of his continuing segregation. This action was filed on December 24, 1985.

(1971); *McNeese v. Board of Education*, 373 US 668, 671-72, (1963); *Monroe v. Pape*, 365 US 167, 173, (1961).

Michigan's tolling provision is not inconsistent with the primary purpose of the Civil Rights Act. In fact, the remedial goals of the statute are furthered by an imprisonment tolling rule. The effect of the rule is to safeguard the prisoner's constitutional rights in recognition of restricted access to the judicial system due to confinement.

This Court has recognized that "[l]itigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel or prepare to proceed *pro se*." *Burnett v. Grattan*, 468 US at 50. Modern reality shows that prisoners access to attorneys is far from adequate. That fact was acknowledged in *Johnson v. Avery*, 393 US 483 (1969):

While the demand for legal counsel in prison is heavy, the supply is light. For private matters of a civil nature, legal counsel for the indigent in prison is almost non-existent.

393 US at 493.

(concurrence by Douglas, J.)

Assuming that self help is the only practical way for many prisoners to gain access to the courts, a question concerning legal competence must be posed. It is not realistic to assume that a prisoner will recognize the often subtle constitutional nature of his injury and be qualified to prepare necessary legal pleadings. This Court observed in *Johnson v. Avery, supra*, that "Jails and prisons include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intel-

ligence is limited." 393 US at 487. In a different but related context, this Court declared that "the recognition by this Court that prisoners have certain constitutional rights would be diluted if inmates, often totally or functionally illiterate, were unable to articulate their complaints to the courts." *Wolff v. McDonnell*, 418 US 539, 579 (1974). The observations that this Court has made on the difficulty of prisoner access are reinforced and amplified by the factual findings of the federal courts concerning access in Michigan. See *Hadix v. Johnson*, *supra*; and *Knop v. Johnson*, *supra*.

It is consistent with the goals of section 1983 to safeguard a prisoner's constitutional protections with a tolling statute. Those who cannot plead their cause because of illiteracy or because competent counsel cannot be found are protected.

This Court has also recognized that respect for state legislative action promotes the goal of federalism, *Tomanio*, 446 US at 491. Under settled section 1983 law:

federal law incorporates the state's judgment on the proper balance between the policies of repose and the substantive policies of enforcement. . .

Wilson v. Garcia, 471 US at 271.

In other words, the judgment as to "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones" (*Wilson v. Garcia*, 471 US at 271 quoting *Johnson v. Railway Express Agency, Inc.*, *supra*, 421 US 454 at 463-64) is a judgment that has been left to the states. The general value of repose, which is the purpose of all statutes of limitation, while recognized in federal law, see *Wilson v. Garcia*, 471 US at 271, is not a specific

objective of 42 USC Section 1983 or Section 1988. See *Burnett v. Grattan*, 468 US 42 at 54 (1984).

Counsel is aware of two cases in which this Court has invalidated state statutes that time limit actions on the grounds that these statutes were "inconsistent with . . . the laws of the United States" under 42 USC Section 1988.

In *Felder v. Casey*, 486 US ___, 108 S Ct 2302 (1988), this Court reconfirmed its view that the central aim of section 1983 is to provide compensatory relief to those deprived of their federal rights by state action. (486 US at ___, 108 S. Ct. at 2305.) As a consequence, the Wisconsin statute which required notice of a claim to be made before instituting suit was found to be inconsistent with federal law.

In enacting Section 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.

Felder v. Casey, 486 US at ___, 108 S.Ct. at 2308.

In contrast, a state law such as Michigan's imprisonment tolling statute shields and protects the prisoner's constitutional rights and furthers the remedial goals of the federal civil rights law.

Felder v. Casey was not the first case where a state limitation was found to be inconsistent with the goals of Section 1983. In *Burnett v. Grattan*, 468 US 42 (1984), a six month limitation period was borrowed from a Mary-

land statute and applied by a federal district court to time-bar a Section 1983 action. The Court of Appeals for the Fourth Circuit reversed the application of the short limitation period and this Court affirmed. The defendants in *Burnett* argued that prompt assertion and resolution of complaints was an important policy goal of the abbreviated limitation period in Maryland. This Court rejected that argument, declaring:

That policy, keyed to a classification of Plaintiffs cannot pre-empt the broadly remedial purposes of the Civil Rights Act.

468 US at 54.

Defendants also forwarded an argument in *Burnett* that a short limitations period affords public officers protection from a seemingly endless stream of unfounded and often stale lawsuits brought against them. In response to this point the Court said:

This contention undercuts rather than buttresses the case for applying the limitations period embodied in Art 49B to federal civil rights actions. The statement suggests that the legislative choice of a restrictive 6-month limitations period reflects in part a judgment that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing employees ready access to a forum to resolve valid claims. That policy is manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.

468 US at 54, 55.

In summary, this Court has reviewed the applicability of specific state limitations, statutes to civil rights actions

on five occasions since 1980. *Tomanio, supra*; *Chardon v. Fumero Soto, supra*; *Burnett v. Grattan, supra*; *Wilson v. Garcia, supra*; and *Felder v. Casey, supra*. These cases establish that state statutes of limitations, including their interrelated tolling provisions, apply unless the state statutes interfere with or unduly burden assertion of the federal civil rights claim.

IV. THE LOWER COURT DECISION REFUSING TO APPLY MICHIGAN'S IMPRISONMENT TOLLING STATUTE WAS CLEARLY ERRONEOUS

Both the district court and the appellate court below dismissed Mr. Hardin's complaint *sua sponte*, without any record and without an appearance by the State. The Sixth Circuit panel rejected petitioner's argument that Michigan's imprisonment tolling statute should be applied, relying entirely on *Higley v. Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987). The reasoning of *Higley* is unpersuasive and it should be overruled.

A. The Sixth Circuit Decision In *Higley* Is Erroneous.

Higley involved a *pro se* suit filed by a Michigan prisoner who claimed a violation of his eighth and fourteenth amendment rights. The suit was filed approximately three years and five weeks after the occurrence giving rise to the action. The district court dismissed the suit as time barred by Michigan's three year statute of limitations. The Sixth Circuit affirmed the dismissal and refused to apply the imprisonment tolling provision of MCL 600.5851. The *Higley* panel recognized that courts are generally obligated to apply state tolling statutes to section 1983 actions, and conceded that Michigan courts would apply the tolling statutes to inmates under *Hawkins v. Justin, supra*. However, the *Higley* court held that application of the tolling provision to a prisoner

1983 action would be "inconsistent with the policies embodied in Section 1983." 835 F.2d at 624, 627.

Higley begins by acknowledging that the primary purposes underlying 42 USC Section 1983 are "the compensation of prisoners whose federal rights have been violated as well as the prevention of an abuse of power by those acting under color of law." 835 F.2d at 625; see also *Burnett v. Grattan*, 468 US at 54. The *Higley* court recognizes that the primary goal of Section 1983 is furthered by MCL 600.5851, 835 F.2d at 626.

However, the *Higley* court then suggests three alternate purposes of section 1983 and asserts that the Michigan tolling statute conflicts with each of them. First, the court suggests that the tolling statute is inconsistent with the "sound federal policy in attempting to deal with section 1983 claims as promptly as possible." 835 F.2d at 627.

The theory that section 1983 claims must be resolved promptly is not rooted in the large body of section 1983 case law. As *Burnett v. Grattan*, *supra*, points out, the policies of prompt notice and repose further state goals, not the broadly remedial purposes of Section 1983. Indeed, an overly restrictive promptness policy "is manifestly inconsistent with the central objective of the Reconstruction-Era and rights statute". 468 US at 55. No overriding policy of "attempting to deal with section 1983 claims as promptly as possible" can honestly be read into the act.

Second, the court suggests that section 1983's purpose is to serve "a rehabilitative function by providing a 'safety value' for prisoner grievances."⁶ 835 F.2d at 626. Peti-

⁶ The court adopts this purpose from the district court in *Vargas v.*

tioner respectfully suggests that the *Higley* court's characterization of the purpose of section 1983 is a cynical betrayal of the broad remedial purposes of the statute and one which has no support in the decisions of this Court. Section 1983 is a remedial statute for violations of the most serious character. Providing a forum to vindicate constitutional deprivations is not done to humor litigants or to engender respect for the law in prisoners. The purpose of section 1983 is not simply to provide a safety valve for disgruntled inmates who might otherwise act out. The civil rights statutes are intended to create real protections of constitutional rights. It is not rehabilitation but compensation for the wrong that is at stake in a section 1983 damages action.

Third, the *Higley* court recognizes that deterrence of future illegal conduct is a goal of section 1983. The court then concludes that, because of the need for a prompt resolution to effect deterrence, the goal of deterrence is undermined by the Michigan tolling statute.

Deterrence of future misconduct certainly is an attribute of the civil rights act. Yet, it does not follow, as *Higley* would suggest, that delay undermines deterrence. If it is the offending officer alone who is to be deterred, it seems that a lengthy period to bring an action would have

Jago, 636 F.Supp 425 (S.D. Ohio, 1986):

It has long been this Court's opinion that the filing of section 1983 suits by prisoners serves a rehabilitative function, acting as a "safety valve", as it were, to relieve some of the tremendous pressure that builds in any captor/captive situation. By giving due consideration to the suits filed in which deprivations of civil rights are alleged, we hope to engender in those convicted and imprisoned a sense of respect for the law, not an easy task given the jaundiced eye with which most prisoners observe those in legal authority.

636 F.Supp at 429.

a stronger not weaker deterrent effect. If the goal is to deter others from similar unconstitutional conduct, it is best served by making an example out of the constitutional tort feisor. In such a situation the deterrence is widespread, not confined to one offending guard. Presumably, in a prison setting, the greatest deterrence takes place every time a victim prevails in court.

Under MCL 600.5805(8), a Michigan inmate has three years from the date that the section 1983 cause accrues to file suit. *Higley*, 835 F.2d 624, citing *Wilson v. Garcia*, *supra*. With normal docket delays, a section 1983 suit may not come to judgment until four years or more after accrual of the cause. Certainly, Michigan's three year statute is not inconsistent with the deterrent purposes of section 1983, *Wilson v. Garcia*, *supra*, and certainly the "judgment on the proper balance between the policies of repose and . . . enforcement" is a decision for the state legislature, not the federal court. *Wilson v. Garcia*, 471 US 271.

The *Higley* court bases its decision on two district court decisions, *Perotti v. Carty*, 647 F.Supp 39 (SD Ohio 1986) and *Campbell v. Guy*, 520 F.Supp 53 (ED Mich 1981), *aff'd* 711 F.2d 1055 (CA 6, 1983), *cert. den.* 464 US 1051. Both cases apply prisoner tolling statutes on a case by case basis and permit the conclusion that "as appellant's filing of suit in district court shows, he is in fact not legally disabled." 833 F.2d at 626.

There is, of course, an unavoidable circularity to the court's logic. Every inmate who files a suit in federal court shows that *he* has access to the court.

Presumably, the Michigan legislature passed the tolling statute because of a belief that many inmates were subject to restrictions on their access to the legal system. As this

Court has recognized: "The drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making necessary classifications is neither possible nor necessary." *Massachusetts Bd. of Retirement v. Murgia*, 427 US 307, 314 (1976). Indeed our federal system survives due to judicial restraint in recognizing that "even improvident decisions will eventually be rectified by the democratic process." *Vance v. Bradley*, 440 US 93, 97 (1979). Moreover, the "case by case" interpretation of MCL 600.5851 endorsed by the *Higley* court had been proposed to and specifically rejected by the Michigan Court of Appeals in *Hawkins*. 109 Mich at 749.

In the final analysis, the *Higley* decision rests on the court's belief that:

There is no logical basis for applying a tolling period to encourage stale claims in the face of such ready availability of a federal forum to hear and to consider these claims.

833 F2d at 626.

Simply stated, the *Higley* court disagrees with the Michigan legislature in its conclusion that inmates' access to the courts is to some extent restricted due to their imprisonment. 109 Mich App 747-748. The prior decisions of this Court demonstrate that the lower court cannot impose its policy judgments concerning a state tolling law on a state. *Tomanio, supra*; *Chardon v. Fumero Soto, supra*.⁷

⁷ The civil rights act could be amended so that a uniform federal statute of limitations were imposed or, perhaps, so that state tolling provisions would not be applicable. However, this power is reserved for the Congress. See *Miller v. Smith*, 615 F.2d 1037, 1044 (CA 5, 1980).

B. Tolling Statutes In Other Circuits

A number of federal circuits have had the opportunity to review the applicability of state prisoner disability tolling statutes in section 1983 actions. While several circuit courts have been troubled by the issue, the majority of the circuits recognize that *Wilson v. Garcia*, *Tomanio*, and *Fumero Soto*, require federal courts to apply state tolling statutes.

The *Higley* decision pointed out two Ninth Circuit cases that had analyzed the prisoner tolling issue quite fully, 835 F.2d at 624, citing *May v. Economoto*, 633 F.2d 164 (CA 9, 1980), and *Major v. Arizona*, 642 F.2d 311 (CA 9 1981). *May* found the California state tolling provisions to be applicable to section 1983 claims, following *Ney v. State of California*, 439 F.2d 1285 (CA 9 1971). *Major* found Arizona's tolling statute not applicable, but on a different ground than that relied on by the *Higley* court. The *Major* court, interpreting Arizona law, held that the Arizona prisoner tolling statute would not be enforced by Arizona courts. 642 F.2d at 315.

The *Major* decision was overruled three years later after the Ninth Circuit reconsidered the statute in light of an Arizona appellate court decision, *Smith v. MacDougall*, 676 P2d 656 (Ariz App 1983), which found the prisoner tolling law to be valid under Arizona law. *Stephan v. Dowdle*, 733 F.2d 642 (CA 9 1984). While the result reached in the *Major* case was wrong, it correctly observed that federal courts must pay heed to a state court's view of its own laws. The *Major* panel stated that:

A state legislative enactment is not to be literally or mechanically applied by federal courts. Rather, a federal court charged with the application of state law must enlist aid and guidance provided by that

state's courts whose responsibility it is in the first place to interpret and construe the statute.

(citations omitted) 642 F.2d at 313.

In a strong dissent to *Major*, Circuit Judge Alarcon complained that the mandate of *Board of Regents v. Tomanio*, 446 US 478 (1980), to apply state tolling law unless inconsistent with the federal constitution or statutes was being ignored and that the majority should not "be boldly charting new paths in unexplored legal territory." 642 F.2d at 315-16.

In the Seventh Circuit, an Indiana prisoner tolling provision was considered in light of *Tomanio*, *supra*, and it was found to be applicable. *Bailey v. Faulkner*, 765 F.2d 102 (CA 7, 1985). Judge Posner, writing for the panel, recognized that a tolling statute could be disregarded if it produced results inconsistent with the policies of section 1983, but concluded:

we cannot say that a provision that gives a prisoner more time than he would otherwise have (or deserve) in which to bring a suit under that section would be inconsistent with the policies of section 1983.

765 F.2d at 104

In his discussion, Judge Posner pointed out that the Seventh Circuit had already approved the application of an Illinois prisoner disability statute in *Duncan v. Nelson*, 466 F.2d 939 (CA 7 1972), and that the *Tomanio* decision placed the correctness of *Duncan v. Nelson*, beyond question. 765 F.2d at 104.

The Second Circuit Court of Appeals reached the same result in *Ortiz v. LaVallee*, 442 F.2d 912 (CA 2, 1971). In facts quite similar to the instant case, the prisoner's *pro se* complaint was dismissed by the district court without a

hearing, based on the ground that it was time barred by New York's applicable three year statute of limitations. The prisoner appealed, claiming that the New York tolling provision for imprisonment should have been applied and the Second Circuit agreed. The panel looked at the legislative advisory committee report for guidance and concluded that the intent was to have the tolling provision apply. The continued vitality of *Ortiz* was recognized by another panel looking at the New York tolling law in *Kaiser v. Cahn*, 510 F.2d 282 (CA 2, 1974). *Ortiz* correctly noted that the disability provision was motivated by a recognition of the practical as well as the legal difficulties prisoners face in instituting and prosecuting suits. 442 F.2d at 914.

In *Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532 (CA 8, 1987), the court faced a South Dakota statute which tolled the statute of limitations for prisoners on all claims except federal civil rights claims. See 814 F.2d at 533, quoting the statute. The prisoner argued that the exemption for civil rights claims was inconsistent with federal law. The *Hughes* panel found that the South Dakota law discriminated against federal rights by singling out federal civil rights claims for exclusion from the tolling law and was therefore inconsistent with the policies of 42 USC 1983. 814 F.2d at 534-35. The *Hughes* decision is consistent with petitioner's approach in the case at bar and this Court's decisions in *Burnett v. Grattan*, *supra*, and *Felder v. Casey*, *supra*.

In *Miller v. Smith*, 615 F.2d 1037 (CA 5, 1980) the Fifth Circuit adopted a case by case application of the Texas prisoner tolling statute. The court held that the prisoner should be entitled to invoke tolling only "as to any period while he was in prison and before access to the federal courts was freely available to state prisoners." 615 F.2d at

1042. The *Miller* decision contained a dissent where Judge Kravitch questioned the authority of a federal court to alter a state statute by imposing its own condition precedent. In his opinion, he characterized the majority as encroaching upon the legislative and judicial functions of the state, pointing out that the Texas legislature had modified and reaffirmed the provision and that the Texas appellate court had expressly approved it. Finally, the dissent said:

Although I concede that the historical need for tolling during imprisonment has diminished in recent years (citation omitted) . . . whether it has diminished sufficiently for the provision to be discarded is for the State of Texas to determine.

615 F.2d at 1044.

Miller v. Smith was decided shortly before this Court decided the *Tomanio* case. Upon receipt of *Tomanio*, the *Miller* panel reconsidered and overruled *Miller I* in *Miller v. Smith*, 625 F.2d 144 (CA 5 1980).

The Tenth Circuit Court of Appeals in *Brown v. Bigger*, 622 F.2d 1025 (CA 10, 1980), rejected a district judge's ruling which dismissed an inmate's section 1983 suit as untimely filed under the Kansas statute of limitations. The *Brown* court found the Kansas imprisonment tolling statute to require tolling by its plain language and noted that two Kansas courts, *Domann v. Pence*, 183 Kan 196, 326 P2d 260 (1958); *State v. Calhoun*, 50 Kan 523, 32 P 38 (1893), had adopted a literal interpretation of the state tolling statute.

The Eleventh Circuit has adopted a somewhat different approach to the evaluation of the validity of state prisoner tolling statutes. *Turner v. Evans*, 721 F.2d 341 (CA 11, 1983); *Whitson v. Baker*, 755 F.2d 1406 (CA 11, 1985).

Both decisions recognize that state tolling laws apply to section 1983 actions to the same extent that the state itself would apply the tolling provision. Both Eleventh Circuit panels therefore certified the state law issue to the appropriate state supreme court. In *Turner*, the Georgia Supreme Court informed the circuit court that:

Even though the reasons for tolling . . . may have disappeared . . . the tolling provision . . . for prisoners is still valid law, with the authority to repeal it residing solely with the legislature.

721 F.2d at 342.

In *Whitson*, the Alabama court held that the prisoner tolling statute was still valid law in that state, 755 F.2d at 1409, but the Plaintiff *Whitson*, as a pretrial detainee, was not within the class of persons protected by that statute. 755 F.2d at 1410.

The Sixth Circuit's blind adherence to *Higley* in the case at bar suggests that *Higley* is the only statement on this issue in the Sixth Circuit. This inference is incorrect. The court's discussion in *Mulligan v. Schlacter*, 389 F.2d 231 (CA 6, 1968) and *Williams v. Hollins*, 428 F.2d 1221 (CA 6, 1970) suggest that the circuit was aware of and would apply state tolling law in 1983 cases. *Mulligan* held the statute inapplicable based on a finding that the action accrued before the petitioner's incarceration. 389 F.2d at 233. *Williams* held that the Tennessee statute of limitations was not tolled because, unlike Michigan, there was no prisoner disability tolling law.

In *Austin v. Brammer*, 555 F.2d 142 (CA 6, 1977) the Sixth Circuit reversed and remanded a dismissal of an inmate's section 1983 complaint because the district court had not considered the applicability of the Ohio prisoner's tolling statute. 555 F.2d 144. If the *Austin* panel were of

the opinion that the Ohio tolling statute was inconsistent with section 1983, it would not have squandered judicial resources by remanding the case for a fruitless hearing. See also *Covington v. Winger*, 562 F.Supp 115 (WD Mich 1983), aff'd 746 F.2d 1475 (CA 6, 1984), cert. den. 470 US 1056 (1985); *Kurzawa v. Mueller*, 545 F.Supp 1254 (ED Mich 1982), aff'd 732 F.2d 1456 (CA 6, 1984).

In summary, the majority of Circuits considering the problem of the applicability of state prisoner tolling statutes to section 1983 claims have properly recognized that federal courts should apply these statutes, as the state would apply them, to these claims. *Wilson v. Garcia*, *supra*; *Tomanio supra*; *Chardon v. Fumero Soto*, *supra*. *Higley's* reasoning is inconsistent with the rationale of this Court's decisions in these cases and with the result reached by the majority of the circuit courts addressing the issue.

RELIEF

For the reasons set forth, petitioner requests that the decision of the Court of Appeals for the Sixth Circuit be reversed and that this action be remanded to the district court for trial.

Respectfully submitted,

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
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No. 87-7023

**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term, 1988

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether Michigan's open-ended tolling statute, MCL 600.5851(1), when applied to § 1983 claims by prisoners against prison personnel which accrued during imprisonment, is inconsistent with the policies embodied in 42 USC § 1983.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	vi
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
I THE APPLICATION OF MICHIGAN'S TOLLING PROVISION, MCL 600.5851(1), TO § 1983 ACTIONS COMMENCED BY PRISONERS AGAINST PRISON PERSONNEL FOR CLAIMS WHICH ACCRUE DURING IMPRISONMENT IS INCONSISTENT WITH THE POLICIES UNDERLYING 42 USC § 1983	11
A. A three-step analysis must be undertaken before a state rule or statute may be borrowed for application to a § 1983 action.....	11
B. Michigan's tolling statute, MCL 600.5851(1), as applied to prisoner claims which accrue during imprisonment, provides a period of time in which to file a claim that is dependent on the sentence of the prisoner	13

C.	It is the federal policies underlying § 1983 which must control whether a state rule of decision may be borrowed, not what the state legislature's purpose was in enacting the statute	15
D.	Application of Michigan's tolling statute to § 1983 claims of prisoners against prison personnel which accrued during imprisonment is inconsistent with the deterrent objective embodied in 42 USC § 1983	18
E.	Not applying Michigan's tolling statute, MCL 600.5851(1), to prisoner § 1983 claims against prison personnel is neutral with regard to the objective of compensation embodied in 42 USC § 1983	20
II	PRISONERS HAVE READY ACCESS TO THE FEDERAL COURTS FOR § 1983 ACTIONS	28
III	THE VARIOUS CIRCUIT COURTS OF APPEAL HAVE NOT ANALYZED TOLLING STATUTES WHEN APPLIED TO § 1983 ACTIONS FILED BY PRISONERS TO DETERMINE IF THEY ARE INCONSISTENT WITH THE OBJECTIVES EMBODIED IN 42 USC § 1983	32
	RELIEF	41

TABLE OF AUTHORITIES

	Pages
Cases	
<u>Bailey v Faulkner</u> , 765 F2d 102 (CA 7, 1985)	29, 36
<u>Board of Regents v Tomanio</u> , 446 US 478 (1980)	<u>passim</u>
<u>Bounds v Smith</u> , 430 US 817 (1977)	8, 28
<u>Brown v Bigger</u> , 622 F2d 1025 (CA 10, 1980)	35
<u>Burnett v Grattan</u> , 468 US 42 (1984)	16, 17, 19, 20
<u>Duncan v Nelson</u> , 466 F2d 939 (CA 7, 1972)	34
<u>Felder v Casey</u> , 487 US ___, 108 S Ct 2302 (1988)	16, 19, 27
<u>Hadix v Johnson</u> , 694 F Supp 259 (ED Mich, 1988)	28, 30
<u>Hadix v Johnson</u> , Sixth Circuit Docket No. 88-1879	31
<u>Higley v Michigan Department of Corrections</u> , 835 F2d 623 (CA 6, 1987)	<u>passim</u>
<u>Hughes v Sheriff of Falls River County Jail</u> , 814 F2d 532 (CA 8, 1987)	23, 37, 40
<u>Johnson v Avery</u> , 393 US 483 (1969)	8, 29

<u>Johnson v Railway Express Agency,</u> 421 US 454 (1975)	26
<u>Knop v Johnson,</u> 667 F Supp 467 (WD Mich, 1987)	28, 30
<u>Knop v Johnson, Sixth Circuit</u> Docket Nos. 88-1563/1634	31
<u>May v Enomoto,</u> 633 F2d 164 (CA 9, 1980)	35
<u>Miller v Smith,</u> 625 F2d 643 (CA 5, 1980)	36
<u>Miller v Smith,</u> 615 F2d 1037 (CA 5, 1980)	36
<u>Ney v State of California,</u> 439 F2d 1285 (CA 9, 1971)	33
<u>Ortiz v LaVallee,</u> 442 F2d 912 (CA 2, 1971)	33
<u>Robertson v Wegmann,</u> 436 US 584 (1978)	7, 15
<u>Stephan v Dowdle,</u> 733 F2d 642 (CA 9, 1984)	36
<u>Turner v Evans,</u> 721 F2d 341 (CA 11, 1983)	34, 35
<u>Vargas v Jago,</u> 636 F Supp 425 (SD Ohio, 1986)	19
<u>Whitson v Baker,</u> 755 F2d 1406 (CA 11, 1985)	8, 32, 34
<u>Wilson v Garcia,</u> 471 US 261 (1985)	11, 17, 22

Statutes

42 USC § 1983	<u>passim</u>
42 USC § 1988	6, 11, 34
MCL 600.5805	3
MCL 600.5805(8)	21
MCL 600.5851(1)	<u>passim</u>

STATUTORY PROVISIONS INVOLVED

42 USC Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC Sec. 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS', and of Title 'CRIMES', for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ...

MCL 600.5805(1):

A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

MCL 600.5805(8):

The period of limitations is 3 years after the time of death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

MCL 600.5851(1):

Except as otherwise provided in subsection (7), if the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.

STATEMENT OF THE CASE

Respondent Dennis Straub was never served with Petitioner's complaint and did not participate in either the District Court or the Sixth Circuit Court of Appeals proceedings in this matter. The relevant facts as may be gleaned from the District Court and Court of Appeals files are as follows:

Petitioner Tyrone Victor Hardin claims he was moved from Kent County Jail to Southern Michigan Prison on October 24, 1980 where he was taken to the Reception and Guidance Center and placed in administrative segregation. In January of 1981, he alleges he was placed in a detention cell until March, 1981, when he was returned to Kent County for trial. On May 14, 1981, Petitioner claims he was returned to the state

prison system and again placed in administrative segregation. On July 15, 1981, Petitioner claims he was transferred to Marquette State Prison. J. App. p 8.

Petitioner claims that he was denied an opportunity for a hearing before he was placed in administrative segregation in violation of 1979 AC, R 791.3315. J. App. p 7. Petitioner further claims that he was unaware that his being placed in administrative segregation violated his civil rights until he received a Michigan Department of Corrections rule book in July of 1984. He further claims that it was not until September of 1985 when he obtained his classification report that he learned that his being placed in administrative segregation

might conflict with the rules. (Petition for Certiorari, p 4).

On December 24, 1985, Petitioner filed a 42 USC § 1983 complaint, on a form provided by the Michigan Department of Corrections, in the United States District Court for the Eastern District of Michigan claiming that his administrative confinement in 1980 and 1981 violated his civil rights. J. App. p 2. The District Court sua sponte reviewed the complaint and on February 26, 1986 dismissed it holding that Michigan's three-year statute of limitations, MCL 600.5805, barred Petitioner's action. J. App. p 26. Petitioner filed a motion to vacate the dismissal which was denied on May 21, 1987, as untimely. J. App. p 33.

On appeal to the Sixth Circuit Court of Appeals the District Court decision was affirmed without oral argument. The Sixth Circuit based its decision on Higley v Michigan Department of Corrections, 835 F2d 623 (CA 6, 1987), which held that Michigan's tolling statute, MCL 600.5851(1), was inconsistent with 42 USC § 1983 when applied to a claim by a prisoner against a prison official which accrued while the plaintiff was imprisoned.

A motion for rehearing en banc was denied on February 18, 1988. Petitioner timely filed a pro se petition for a writ of certiorari which was granted on October 11, 1988. The order granting the petition for writ of certiorari limited the question to be presented to the court

to the first question contained in the
petition for certiorari. J. App. p 37.

SUMMARY OF ARGUMENT

Michigan's tolling statute, MCL 600.5851(1), provides that an individual with one of the named disabilities has one year after the disability is removed to file a complaint. The issue involved in Petitioner's complaint is whether Michigan's tolling provision, when applied to prison actions against prison personnel for claims which accrued during imprisonment, is inconsistent with 42 USC § 1983. It is acknowledged that 42 USC § 1988 allows federal courts to borrow state rules of decision not included within federal law, unless the state rule is inconsistent with the underlying federal objectives of § 1983. Board of Regents v Tomanio, 446 US 478 (1980).

Michigan's tolling statute, MCL 600.5851(1), is open-ended in that it has

no fixed term. The length of the tolling period where a prisoner is involved is dependent on the length of the sentence imposed by the sentencing court. In some cases, Michigan's tolling provision will allow a prisoner to maintain a § 1983 action against prison personnel decades after the conduct complained of has occurred.

The principal objectives of § 1983 are to prevent the abuse of power by those acting under color of state law (deterrence) and to compensate those whose federal rights have been violated (compensation) Robertson v Wegmann, 436 US 584 (1978). By allowing such lengthy and indeterminable delays, the statute as applied to prisoner actions against prison personnel for a claim which

accrues while imprisoned is inconsistent with the deterrent objective of 42 USC § 1983.

Since Bounds v Smith, 430 US 817 (1977) and Johnson v Avery, 393 US 483 (1969), prisoners are constitutionally guaranteed adequate access to the courts. The Sixth and the Eleventh Circuit Courts of Appeal have recognized that prisoners do indeed have access to the courts as evidenced by the number of § 1983 cases that have been filed. Higley v Michigan Department of Corrections, 835 F2d 623 (CA 6, 1987), Whitson v Baker, 755 F2d 1406 (CA 11, 1985).

While other circuit courts have usually found that the state tolling statutes do apply in § 1983 actions, they have failed to analyze their application

in terms of consistency with the objectives embodied in § 1983. The Sixth Circuit Court of Appeals in Higley did analyze Michigan's tolling statute using the standards provided in Tomanio. In using these standards the Sixth Circuit found that Michigan's tolling provision was inconsistent when applied to prisoner § 1983 claims against prison personnel which accrued during imprisonment. The Eighth Circuit, while finding South Dakota's statute of limitations, which provides a fixed maximum tolling period, consistent with § 1983, directly implied that if it were faced with an open-ended tolling statute such as Michigan's, it might find it inconsistent with § 1983.

Accepting Petitioner's argument that Michigan's open-ended tolling statute is

consistent with § 1983 will only encourage unnecessary litigation at the expense of the continued violation of prisoner civil rights. Whereas, accepting Respondent's position will help to deter further violations of prisoner civil rights without depriving those individuals whose rights have been violated from being compensated for their injuries.

I

THE APPLICATION OF MICHIGAN'S TOLLING PROVISION, MCL 600.5851(1), TO § 1983 ACTIONS COMMENCED BY PRISONERS AGAINST PRISON PERSONNEL FOR CLAIMS WHICH ACCRUE DURING IMPRISONMENT IS INCONSISTENT WITH THE POLICIES UNDERLYING 42 USC § 1983.

- A. A three-step analysis must be undertaken before a state rule or statute may be borrowed for application to a § 1983 action.

Congress, in enacting 42 USC § 1983, did not provide all of the rules of decision necessary to adjudicate the claims. In enacting 42 USC § 1988, Congress endorsed the borrowing of those state rules of decision necessary to adjudicate claims under § 1983. Wilson v Garcia, 471 US 261 (1985), which dealt with the issue of which of two possible statutes of limitation applied to § 1983 claims, directed courts to follow a three-step process in determining whether

a state rule of decision was to be applied in § 1983 claims. The Court stated:

"The language of § 1988, [footnote omitted] directs the courts to follow 'a three-step process' in determining the rules of decision applicable to civil rights claims:

"'First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." [42 USC § 1988 [42 USCS § 1988].] If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States." Ibid.' Burnett v Grattan, 468 US 42, 47-48, 82 L Ed 2d 36, 104 S Ct 2924 (1984)." 471 US 267.

No issues have been raised by Petitioner regarding the first two steps in the process. The sole question before

the Court involves the third step. Specifically, the narrow question in this case is whether Michigan's tolling statute, MCL 600.5851(1), when applied to a § 1983 claim of a prisoner against prison personnel which accrued while plaintiff was imprisoned, is inconsistent with the federal policies embodied in 42 USC § 1983.

- B. Michigan's tolling statute, MCL 600.5851(1), as applied to prisoner claims which accrue during imprisonment, provides a period of time in which to file a claim that is dependent on the sentence of the prisoner.

Michigan's tolling statute, MCL 600.5851(1), provides:

"Except as otherwise provided in subsection (7), if the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action

although the period of limitations has run. This section does not lessen the time provided for in section 5852."

As applied to an imprisoned individual, the tolling provision is, in essence, open-ended because the extended tolling period in which an action must be filed is dependent on the sentence of the prisoner. Two prisoners whose civil rights are violated during the same event may have differing periods in which to file a claim. If one prisoner's sentence is five years and another's is 25 years, and they began their sentences on the same day and the event causing the violation occurred on that date, one prisoner would be required to file within six years of accrual, while the second prisoner would have 26 years to file if the express language of the statute is

applied. A prisoner's claim may lay dormant for decades, in the case of a prisoner serving 30 or 40 years, before it is legally necessary to file a complaint. Applying the express language of Michigan's tolling provision to Petitioner's § 1983 action would result in his complaint being timely.

- C. It is the federal policies underlying § 1983 which must control whether a state rule of decision may be borrowed, not what the state legislature's purpose was in enacting the statute.

In determining whether Michigan's tolling statute may be borrowed for use in adjudicating a § 1983 claim, it must not only be consistent with the statute and federal constitutions, but also with the policies embodied in 42 USC § 1983. Robertson, in deciding whether to apply Louisiana law to abate a § 1983 claim

after the death of the plaintiff, identified two principal policies contained in § 1983. The Court held:

"In resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at 'the policies expressed in [them]' [citations omitted] ... The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." 436 US at 590-591.

These policies have since been reaffirmed in other cases including Board of Regents v Tomanio, 446 US 478, 488 (1980), Burnett v Grattan, 468 US 42, 53 (1984), Felder v Casey, 487 US ___, 108 S Ct 2302, 2307 (1988).

While it is true the Michigan legislature amended the tolling statute in 1972, its purpose in doing so is not

to be the exclusive basis for determining whether or not the statute should be borrowed in § 1983 actions by prisoners. It is the federal interest which is paramount, not the state purpose in enacting the tolling provision. As stated in Wilson:

"...state law shall only apply 'so far as the same is not inconsistent with' federal law. This requirement emphasizes 'the predominance of the federal interest,' in the borrowing process, taken as a whole. (Citation omitted)." 471 US at 269.

In Burnett, relating to whether to apply an administrative statute of limitation of six months to a § 1983 claim, it was held:

"To the extent that particular state concerns are inconsistent with, or of marginal relevance to, the policies informing the Civil Rights Acts, the resulting statute of limitations may be inappropriate for civil rights claims. [footnote omitted]." 468 US 52.

A determination must be made based on federal interests not those of the state.

- D. Application of Michigan's tolling statute to § 1983 claims of prisoners against prison personnel which accrued during imprisonment is inconsistent with the deterrent objective embodied in 42 USC § 1983.

Michigan's tolling statute on its face appears benign, but when applied to § 1983 prisoner actions, a more in-depth review reveals that its application is inconsistent with the deterrence objective of the Civil Rights Act. Petitioner's claim that Michigan's tolling provision furthers the goals of § 1983 is contrary to logic when applied to the objective of deterrence, given the open-ended nature of the statute.

The Sixth Circuit in Higley recognized that prompt resolution of § 1983 claims was necessary for the deterrent objective of the statute to be realized. Quoting with acceptance Vargas

v Jago, 636 F Supp 425 (SD Ohio, 1986),
the Court concluded:

"'We cannot help but believe that, in order to effect the rehabilitative purpose described above, as well as to deter prison officials from misconduct, quick resolution of disputes is vital. Promptness is even more important, we think, when a prisoner is complaining that his current incarcerators are violating, or have violated, his civil rights. To allow a prisoner one year after his release to bring his section 1983 suit neither would effect deterrence as to the alleged offender, nor rehabilitation as to the alleged victim.'" 835 F2d at 626.

It is acknowledged that prompt resolution of prisoner § 1983 claims cannot place an undue burden on the inmate by restricting the time in which to file a complaint to such a short time that the right to redress is illusory as was the situation in Felder and Burnett. In Felder, the Court found that a Wisconsin notice of claim statute

restricted plaintiff to such an extent the statute was inconsistent with the policies of § 1983. Similarly, the Court in Burnett found a six-month limitation period too restrictive and thus inconsistent with § 1983. No claim has been made that Michigan's three-year statute of limitations for § 1983 claims is too restrictive.

E. Not applying Michigan's tolling statute, MCL 600.5851(1), to prisoner § 1983 claims against prison personnel is neutral with regard to the objective of compensation embodied in 42 USC § 1983.

While applying Michigan's tolling statute would be inconsistent with the deterrent objective of § 1983, it is neutral in its effect on the compensation objective of the statute. A prisoner is not denied his opportunity for compensation if the tolling provision is

not applied, he is only required to bring his action within the three-year period provided by the statute of limitation, MCL 600.5805(8). As the Sixth Circuit pointed out in Higley:

"Although the application of the tolling provision is not inconsistent with this policy, [compensation] the goal of compensation certainly does not require the application of the tolling statute based solely on incarceration." 835 F2d at 626.

Application of Michigan's tolling statute would be inconsistent with the deterrent objective of § 1983 and not applying the statute is neutral regarding the compensation objective. Michigan's tolling statute should, therefore, not be borrowed to allow a prisoner to file a § 1983 action against prison personnel on a claim which accrued while imprisoned beyond the three-year period provided in MCL 600.5805(8).

While the principal objectives of § 1983 are deterrence and compensation, there are other federal interests which must be considered in determining whether to borrow a state tolling statute. Included in those interests are uniformity, certainty, and minimization of unnecessary litigation. In Wilson, in support of its adopting the state statute of limitations relating to personal injury as applicable to § 1983 claims, the Court held:

"The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach." 471 US at 275.

Application of Michigan's tolling statute to § 1983 actions by a prisoner against prison personnel which accrue while the plaintiff is imprisoned does not advance these federal interests.

Regarding uniformity and certainty, it is recognized that perfect uniformity and absolute certainty in the area of statutes of limitations and the tolling provisions cannot be achieved unless there is federal legislation. A tolling statute to be borrowed must not, however, create disparate treatment of similar claims based on geography. To allow a prisoner's § 1983 claim to be barred in one state in a specific maximum number of years as in South Dakota, (see Hughes v Sheriff of Falls River County Jail, 814 F2d 532 (CA 8, 1987)), and to allow the same claim to remain viable for decades, as in Michigan, does not advance the cause of uniformity or certainty.

Even within Michigan if the tolling statute is applied, the same § 1983

prisoner claim would be subject to a different time period for filing depending on the length of the prisoner's sentence. If two prisoners are involved in the same improper conduct by prison personnel, on the day of imprisonment, one serving a five-year sentence and the other a 40-year sentence, the first prisoner would be required to file his action in six years, the second prisoner in 41 years. Such a disparity does not promote uniformity nor certainty in § 1983 actions.

To promote uniformity and certainty, a fixed period of time needs to be readily ascertainable from the statutes by a plaintiff. Michigan's tolling statute does not provide the necessary elements to be consistent with the

federal interests of uniformity and certainty.

The federal interest in reducing unnecessary litigation is also not served by Michigan's tolling statute in § 1983 prisoner claims. If Michigan's tolling statute is applied to § 1983 claims by a prisoner, it could remain viable for decades. During this period the conduct which resulted in the claim could continue resulting in the accrual of more claims. Many of these new claims would have been avoided if the prisoner had not been allowed to wait to file his claim. If a claim is filed within the three-year period provided by Michigan's statute of limitation, years of potential litigation are avoided.

The advancement of federalism should be considered. Tomanio, supra, which

found in a non-prisoner § 1983 action that New York's tolling statute applied, stated:

"Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 USC § 1983." 446 US at 492.

Federalism should not, however, be the determining factor in whether a state statute is consistent with the purposes of § 1983. As stated in Johnson v Railway Express Agency, 421 US 454, 465 (1975):

"...considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration."

Since Michigan's tolling statute is inconsistent with one of the principal objectives of § 1983, deterrence, the interest of federalism is subjugated to the principal objective.

To allow the goal to advance federalism to override the principal objectives of § 1983 would, in effect, render § 1983 ineffective in carrying out Congress' purpose. If federalism would have controlled the decision in Felder, the Wisconsin notice of claim statute would have been upheld. The effect would have been to unduly restrict a § 1983 claimant, and as a result, undermine the objectives of Congress in enacting § 1983.

II

PRISONERS HAVE READY ACCESS TO THE
FEDERAL COURTS FOR § 1983 ACTIONS.

Petitioner argues that the Michigan tolling statute should be applied to prisoner § 1983 actions to allow the prisoners ready access to the courts. (Petitioner's brief, pp 9-11). Petitioner cites two District Court cases, Knop v Johnson, 667 F Supp 467 (WD Mich, 1987) and Hadix v Johnson, 694 F Supp 259 (ED Mich, 1988), to support his claim that prisoners do not have adequate access to the courts.

Although no question of access to the courts was raised by Petitioner in the District Court or the Court of Appeals, it should be noted that this Court in Bounds v Smith, 430 US 817 (1977), required:

"...prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 US at 828.

Additionally, the Court in Johnson v Avery found that a state may not prohibit inmates from providing assistance to other inmates in filing legal actions. Access is a separate constitutional issue from the issue of whether application of Michigan's tolling statute to a prisoner's § 1983 claim is inconsistent with the objectives of the statute and one that has already been addressed by this Court.

Bailey v Faulkner, 765 F2d 102 (CA 7, 1985), which found that Indiana's tolling statute must be applied, recognized that prisoners were no longer disabled from filing § 1983 suits. In discussing

Indiana's tolling provision, the Court stated:

"This provision, hopelessly archaic in an era when the ready access of prisoners to the courts, state and federal, is constitutionally guaranteed by cases such as Bounds v Smith (citation omitted) was repealed that year." 765 F2d at 103.

The Court should be aware of two things regarding access of prisoners in Michigan to the courts for purposes of § 1983. First, that prisoners may obtain a § 1983 claim form to file an action which is provided by the Michigan Department of Corrections to the inmates. J. App. p 2. The prisoner is advised on the form that if help is needed in completing the form, a Correctional Ombudsman is provided to the inmate to help. J. App. p 10. Secondly, the Court should be aware that both Hadix, supra, and Knop, supra, are presently on appeal

to the Sixth Circuit Court of Appeals, Knop v Johnson, Sixth Circuit Docket Nos. 88-1563/1634 and Hadix v Johnson, Sixth Circuit Docket No. 88-1879, challenging the findings of lack of access to the courts.

The issue of access has been addressed by the Sixth Circuit in Higley. The court recognized that prisoners did indeed have access to the courts for § 1983 actions:

"We are accutely aware of the multitude of cases filed by other Michigan prisoners seeking § 1983 relief in federal courts.¹ The plethora of § 1983 cases filed indicates very clearly the accessibility of federal courts to prisoners such as Higley.

"1. For example, more than 150 civil rights cases by Michigan prison inmates were filed during the last six months of 1985 in the Eastern District of Michigan, and some 375 such cases in that period were filed altogether in Michigan federal district courts. Thirty-nine new appeals from these cases were filed

in the Sixth Circuit during the period July 1985 through December 1985." 835 F2d at 626.

The Eleventh Circuit in Whitson v Baker, 755 F2d 1406, 1408 (CA 11, 1985), also acknowledged that prisoners had adequate access to the courts when it found that Alabama had 800 § 1983 actions filed against it each year. Access is not the issue, nor does it appear to be a real problem in § 1983 claims.

III

THE VARIOUS CIRCUIT COURTS OF APPEAL HAVE NOT ANALYZED TOLLING STATUTES WHEN APPLIED TO 1983 ACTIONS FILED BY PRISONERS TO DETERMINE IF THEY ARE INCONSISTENT WITH THE OBJECTIVES EMBODIED IN 42 USC § 1983.

This Court in Board of Regents v Tomanio, 446 US 478, 484-485 (1980), found that state statutes of limitations and the coordinate tolling statutes

should be adopted by federal courts in § 1983 actions, except when inconsistent with the federal policies embodied in 1983. The Sixth Circuit Court of Appeals in Higley analyzed Michigan's tolling statute, MCL 600.5801(1), using the criteria set forth in Tomanio, found that application of Michigan's tolling provision to prisoner § 1983 claims filed against prison personnel which accrued while imprisoned would be inconsistent with the objectives of 42 USC § 1983. That cannot be said for most of the circuit courts of appeal whose decisions are relied upon and cited by Petitioner.

Many of the cases cited by Petitioner, including Ortiz v LaVallee, 442 F2d 912 (CA 2, 1971); Ney v State of California, 439 F2d 1285 (CA 9, 1971);

and Duncan v Nelson, 466 F2d 939 (CA 7, 1972), were decided prior to Tomanio and are therefore not helpful since they did not analyze whether application of the tolling statute would be inconsistent with the objectives of 42 USC § 1983. These cases took a literal approach to applying tolling statutes. In effect the circuit courts stopped short of applying the three-prong test contained in 42 USC § 1988. If there was a state statute which tolled the statute of limitations, it was mechanically applied to § 1983 actions filed by prisoners after looking at the legislative history. The courts rarely considered in any depth what effect applying the tolling statute would have on the objectives of § 1983.

In Turner v Evans, 721 F2d 341 (CA 11, 1983), and Whitson v Baker, 755

F2d 1406 (CA 11, 1985), the Court accepted the Georgia and Alabama Supreme Courts' analyses of the applicability of the tolling statute. The Court in each case found that even though the reasons for the tolling statute had disappeared, it was still valid law and could only be repealed by the legislature. There was no mention of Tomanio, even though it had been decided over two years before Turner, supra, nor was there any analysis of whether the application of the provision to a § 1983 claim would be inconsistent with federal law.

In Brown v Bigger, 622 F2d 1025 (CA 10, 1980), and May v Enomoto, 633 F2d 164 (CA 9, 1980), which were decided just after the opinion in Tomanio was issued, the courts felt bound to apply the state

tolling provision in prisoner § 1983 actions. There was no analysis of whether application was consistent with federal laws, nor was there any mention of Tomanio.

The Fifth Circuit in Miller v Smith, 625 F2d 43 (CA 5, 1980), which reversed its prior finding that the tolling statutes did not apply (Miller v Smith, 615 F2d 1037 (CA 5, 1980)), only stated " ... that under the teachings of Tomanio the prisoner was entitled to the benefit of the Texas tolling statute according to its express terms."

The decision in Miller, as well as Stephan v Dowdle, 733 F2d 642 (CA 9, 1984) and Bailey v Faulkner, supra, acknowledged that Tomanio controlled whether a tolling statute applied to

prisoner § 1983 actions, but there was no analysis as to whether the tolling statutes were inconsistent with policies embodied in § 1983. It appears that the court simply applied the literal language of the tolling statutes as interpreted by the state courts without regard for their impact on federal policy.

In one case, however, a Court of Appeals did analyze the effect of a tolling statute on prisoner § 1983 actions. In Hughes v Sheriff of Falls River County Jail, 814 F2d 532 (CA 8, 1987), the South Dakota statute under review limited the tolling period to a maximum of five years. The court found that this tolling provision was consistent with the objectives of § 1983 in that among other things it did not

interfere with either the compensation or deterrent objectives of § 1983.

The statute reviewed by the Eighth Circuit is unlike Michigan's open-ended tolling provision which has no fixed maximum tolling period. A prisoner in Michigan could, if the tolling statute is applied in § 1983 prisoner actions, file within one year of his release from prison whether it is 15, 20, 30 years or longer from the date that the action accrues. The Eighth Circuit, in commenting on Michigan's tolling statute, strongly implied that if the South Dakota statute were like Michigan's, it might have found it inconsistent with § 1983. The court stated:

"The tolling provisions in Hawthorne [Hawthorne v Wells, 761 F2d 1514 (CA 11, 1985)] and Campbell [Campbell v Guy, 520 F Supp 53 (ED Mich, 1981) aff'd 711 F2d 1055 (CA 6, 1983), cert den 464 U.S. 105 (1984)] would have

tolled the statute of limitations for the entire duration of the prisoner's incarceration, a period that could be measured in decades. The courts concluded that, at least where prisoners were not actually disabled from bringing lawsuits, tolling statutes that permit claims to lie dormant for such long periods are inconsistent with federal policies of repose [citations omitted] and with policies of deterrence underlying federal civil rights laws. [Citations omitted]. The South Dakota tolling provision, however, avoids this problem by limiting the total tolling period to a maximum of five years; thus, a § 1983 claim would in any case have to be brought within eight years of accrual, and this period is not so long as to render the provision inconsistent with the federal policies of repose." 814 F2d at 535.

Thus, while many circuits have encountered issues relating to tolling statutes in § 1983 prisoner actions, the decisions were either pre-Tomanio or they failed to analyze whether the application of the tolling provision in prisoner § 1983 actions would be inconsistent with

the objectives of the federal statute. In Higley and Hughes, the two decisions which have comprehensively analyzed tolling provisions in terms of Tomanio, it has been held or strongly implied that an open-ended tolling statute like Michigan's is inconsistent with the policies underlying § 1983 when applied to prisoner actions against prison personnel which accrued during imprisonment.

RELIEF

For the reasons set forth Respondent Dennis Straub requests that the decision of the Sixth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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